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In the Supreme Court of the United States

OCTOBER TERM, 1987

THOMAS ADAMS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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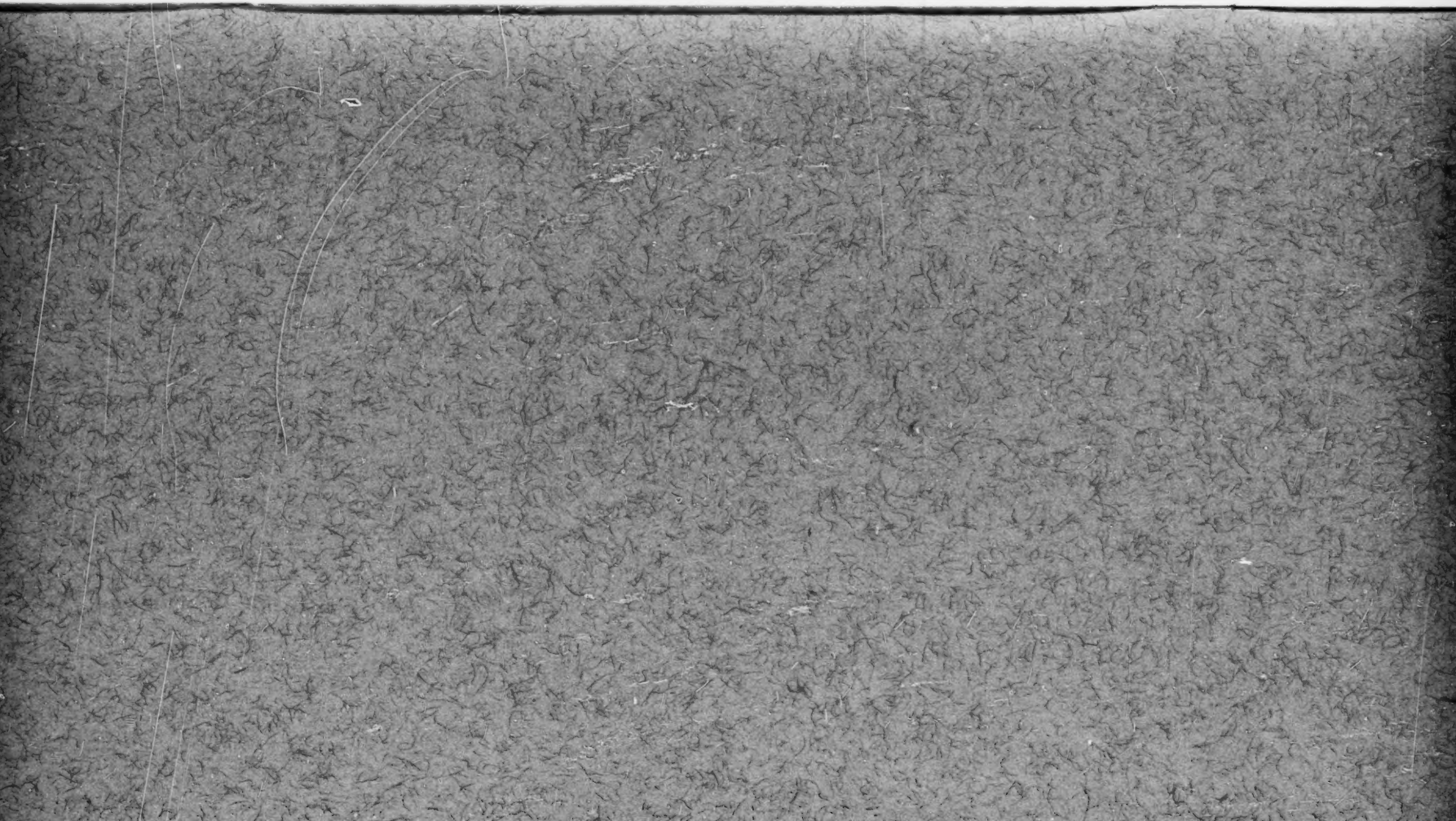

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners, veterans who served in Vietnam and their wives and children, allege that they were injured as a result of the exposure of service members to the herbicide "Agent Orange" and they contend that the courts below erred in concluding that their claims against the government are barred by the discretionary function exception to the Federal Tort Claims Act (FTCA), 28 U.S.C. 2680(a), and the rule of *Feres* v. *United States,* 340 U.S. 135 (1950).

1. Petitioners challenge one of nine related decisions issued by the Second Circuit on April 21, 1987, in the Agent Orange multidistrict litigation (Pet. App. 21a-27a). In doing so, they question the Second Circuit's reasoning in another of those nine related decisions, which more fully elucidates the court's grounds for rejecting petitioners' claims (*id.* at 28a-44a). In this latter case, a number of veterans and their spouses and children, known as the "Aguiar plaintiffs" (*In re "Agent Orange" Product Liability*

Litigation, 818 F.2d 145, 160 (2d Cir. 1987)), sued the government under the FTCA in 1984. The veterans alleged that they suffered various ailments as a result of their exposure to Agent Orange in Vietnam; their wives alleged that they had experienced miscarriages because their husbands had been exposed to Agent Orange; and their children alleged that they suffered birth defects resulting from their fathers' exposure to Agent Orange.

a. The district court held that the claims of the Aguiar plaintiffs were barred by the rule of *Feres. In re "Agent Orange" Product Liability Litigation,* 603 F. Supp. 239 (E.D.N.Y. 1985). The court first held that "[t]here is no question that the veterans' claims against the government for injuries arising from exposure to Agent Orange while in Vietnam are 'incident to service' and barred by the *Feres* doctrine" (*id.* at 243). The court then rejected the plaintiffs' attempts "to circumvent the *Feres* bar through 'artful pleading' " (*id.* at 245). Concerning the plaintiffs' pre-induction claims—that "prior to the induction of many of the servicemen who served in Vietnam, the United States knew or should have known of the hazards posed by exposure to Agent Orange and negligently failed to warn servicemen or take precautions for their safety" (*ibid.*)—the court concluded that any injury resulting therefrom was so related to the veterans' military service that it occurred incident to service. Concerning their post-discharge claims—that the government "failed to warn plaintiffs and see to it that they were properly treated and compensated for any injury sustained" as a result of exposure to Agent Orange (*id.* at 243)—the court similarly concluded that their claims "were 'inseparably entwined' [*sic*] with their military service and so barred by *Feres.*" *Id.* at 244 (quoting *Healy* v. *United States,* 192 F. Supp. 325, 328 (S.D.N.Y.), aff'd, 295 F.2d 958 (2d Cir. 1961)). The court added that the claims were likely barred by the discretionary function exception as well, noting that "the deci-

sion to use herbicides in Vietnam was made by President Kennedy and had the military objectives of clearing underbrush and jungle that provided cover for the enemy and of denying food for opposing forces who were living off the land" (603 F. Supp. at 244).

With respect to the claims of the veterans' wives and children, the district court noted that the government's evidence showed that " 'no laboratory nor epidemiologic evidence exists at this time that is sufficient, to a reasonable degree of certainty or probability, to link embryonal deaths or birth defects to paternal exposure to herbicides while serving in Vietnam' " (603 F. Supp. at 246 (quoting affidavit of Dr. Zena Stein)). The court concluded that "[p]laintiffs have produced no evidence of any probative value to contradict the government's overwhelming showing of no present proof of causation" (*id.* at 247).

Petitioners filed a complaint that is "virtually identical" to the complaint filed by the Aguiar plaintiffs (Pet. App. 18a). Relying on its prior decision, the district court dismissed the veterans' claims, granted summary judgment on the wives' claims, and dismissed the children's claims without prejudice (*id.* at 20a).

b. The court of appeals held that the claims of the Aguiar plaintifffs are barred both by the rule of *Feres* and the discretionary function exception (Pet. App. 28a-44a), after noting that the decision to use Agent Orange, a military decision made by the President with the advice of Congress, is the sort of decision that the courts should hesitate to review (*id.* at 37a-39a). The court found "little difference between these doctrines as they relate to the facts of the instant case. * * * Both preclude judicial 'second-guessing' in FTCA litigation of discretionary legislative and executive decisions such as those that were made concerning Agent Orange" (*id.* at 40a).

With respect to the veterans' claims for in-service injuries, the court found them to be a "classic case" for application of *Feres* (Pet. App. 41a). "At issue is a decision of the veterans' highest military superiors that was designed to help the veterans in fighting the armed conflict in which they were engaged" (*ibid.*). The court also agreed with the district court that the veterans' pre-induction and post-discharge claims were so intertwined with their military service that they are barred by *Feres* (*id.* at 40a-43a). The court added that there was no warrant to permit artful pleading to allow the veterans to bring their claims here because "the weight of present scientific evidence does not establish that Agent Orange injured military personnel in Vietnam" (*id.* at 43a), and noted that "[a]pplication of the discretionary function rule leads ineluctably to the same result" (*id.* at 41a).

In its opinion specifically addressing the claims of petitioners, the court of appeals held that the claims of the veterans' wives and children were also barred (Pet. App. 21a-27a). The court noted that it would be anomalous for " 'a serviceman-husband performing his military duty * * * [to] be denied recovery against the Government whose employee's negligence may have caused him serious injury, while his spouse is allowed recovery as a consequence of the same set of facts.' " *Id.* at 25a (quoting *Harrison* v. *United States,* 479 F. Supp. 529, 535 (D. Conn. 1979), aff'd, 622 F.2d 573 (2d Cir.) (Table), cert. denied, 449 U.S. 828 (1980)). As in *United States* v. *Shearer,* 473 U.S. 52 (1985), the court concluded (Pet. App. 26a), a claim on behalf of a spouse or child challenging the government's decision to use Agent Orange in Vietnam would call into question military decisions, and hence is barred by the rule of *Feres.* The court added that "[w]here, as here, the military decision is of such a nature that it properly may be termed a discretionary function, denial of recovery by both military and nonmilitary personnel is doubly warranted" (*id.* at 26a-27a).

2. The decision below is correct and does not conflict with any decision of this Court or another court of appeals. Accordingly, review by this Court is not warranted.

a. The court of appeals correctly concluded that petitioners' claims are barred by the discretionary function exception. As the court of appeals stated (Pet. App. 39a-40a), the discretionary function exception serves to insulate governmental policy-making, including (perhaps *especially* including) discretionary military decisions, from judicial scrutiny.[1] There can be no question that the decision to use Agent Orange in Vietnam was a policy decision of the sort covered by the discretionary function exception. *Dalehite* v. *United States,* 346 U.S. 15, 37 (1953). And, as the court of appeals noted (Pet. App. 41a), numerous courts have held that the exception bars claims alleging failure to warn where the exercise of discretion was involved. *Ford* v. *American Motors Corp.,* 770 F.2d 465, 467 (5th Cir. 1985); *Cisco* v. *United States,* 768 F.2d 788, 789 (7th Cir. 1985); *Begay* v. *United States,* 768 F.2d 1059, 1066 (9th Cir. 1985); *Shuman* v. *United States,* 765 F.2d 283, 291 (1st Cir. 1985); *General Public Utilities Corp.* v. *United States,* 745 F.2d 239, 243, 245 (3d Cir. 1984), cert. denied, 469 U.S. 1228 (1985); *Green* v. *United States,* 629 F.2d 581, 585-586 (9th Cir. 1980). The decisions petitioners challenge—whether to use Agent Orange

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[1] This Court has repeatedly stated that " '[o]rderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters.' " *Chappell* v. *Wallace,* 462 U.S. 296, 301 (1983) (quoting *Orloff* v. *Willoughby,* 345 U.S. 83, 94 (1953)). It has also noted: "[I]t is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject *always* to civilian control of the Legislative and Executive Branches." *Gilligan* v. *Morgan,* 413 U.S. 1, 10-11 (1973) (emphasis in original).

to assist in combat and whether to warn veterans of its possible harmful effects—are quite plainly "of the nature and quality that Congress intended to shield from tort liability." *United States* v. *S.A. Empresa De Viacao Aerea Rio Grandense* (*Varig Airlines*), 467 U.S. 797, 813 (1984). Furthermore, as the court of appeals concluded, "[t]he very paucity of proof concerning the possible deleterious effects of Agent Orange made the decision whether to issue a nationwide health warning even more clearly an exercise of discretion" (Pet. App. 43a).

Petitioners concede that the decision to use Agent Orange in Vietnam "could very well have been a discretionary function" (Pet. 26). They nevertheless contend that their claim is not barred by the discretionary function exception because the negligence they allege "relate[d] not to the making of that decision but solely to the manner in which that decision was carried out" (*ibid.*). They allege that the government was negligent because "[t]he state of the art under war conditions was such that certain methods of spraying, use of prophylatic [*sic*] and protective gear, medical monitoring and other steps could have been taken to drastically reduce the exposure to, and risk of harm from, Agent Orange, without adversely affecting our soldiers' capability to do battle" (*id.* at 8). However, we think that it is perfectly plain that decisions relating to matters such as what sorts of gear combat personnel can wear without adversely affecting their capability to do battle are discretionary decisions to be made by military decision-makers, and are not subject to second-guessing by way of tort suits.[2] Accordingly, petitioners' claims are

[2] The case on which petitioners rely (Pet. 27-28) in arguing that the discretionary function exception does not bar their claims, *Indian Towing Co.* v. *United States*, 350 U.S. 61 (1955), is clearly inapposite. The alleged negligence there—not keeping a lighthouse operational—is simply not comparable to decisions relating to how to conduct a war. Moreover, the government did not allege that the discretionary function exception barred the suit (*id.* at 64), so that exception was not at issue.

barred by the discretionary function exception.

b. Because petitioners' claims are plainly barred by the discretionary function exception, this case does not present an opportunity to overrule *Feres,* which is what petitioners' primarily seek (Pet. 11-14). Of course, we think that *Feres* was correctly decided. In any event, there is no good reason to revisit this Court's construction of the FTCA, made shortly after it was enacted, nearly four decades later. *Feres* is settled law under the FTCA and, if the Court erred in *Feres,* then, as it noted, "Congress possesses a ready remedy" (340 U.S. at 138). Moreover, this Court reaffirmed *Feres* just last Term in *United States* v. *Johnson,* No. 85-2039 (May 18, 1987).

Nor is there any basis for review of the lower courts' rejection of the various exceptions to *Feres* that petitioners seek to create. With respect to the veterans' claims based on exposure to Agent Orange in Vietnam, petitioners contend (Pet. 18-19) that *Feres* should not bar claims because they have been denied veterans' benefits. They allege that "to say administratively that the injuries are not service-connected and to say in court that they are incident to service smacks of inconsistency" (Pet. 19). As the court of appeals recognized (Pet. App. 42a), that argument "is a distortion of the Government's position." The government has consistently contended, as the court of appeals concluded (*id.* at 43a), that the ailments that petitioners suffer were not caused by exposure to Agent Orange, and their claims for veterans' benefits were denied on that basis. But, assuming arguendo that they were harmed by exposure to Agent Orange in Vietnam, then a tort suit seeking a remedy for that harm is barred by *Feres.*

As both of the courts below concluded, there is no merit to petitioners' arguments (Pet. 17-23) that *Feres* does not bar their claims based on pre-induction and post-discharge negligence barred. The courts below were clearly correct in deciding that petitioners' pre-induction claims are inex-

tricably intertwined with their in-service claims, and petitioners cite no appellate case (and we know of none) finding liability in such circumstances. As for the post-discharge claim, this case is clearly different than *United States* v. *Brown,* 348 U.S. 110 (1954), where negligent treatment in a Veterans' Administration hospital following discharge was found actionable despite *Feres.* The government's alleged negligence here is not a clearly separable wrong, such as a subsequent negligently-performed operation, but is merely a failure to warn of dangers encountered during active service. A number of courts of appeals have rejected similar attempts to circumvent *Feres. Hamilton* v. *United States,* 719 F.2d 1, 1 (1st Cir. 1983); *Gaspard* v. *United States,* 713 F.2d 1097, 1101 (5th Cir. 1983), cert. denied, 466 U.S. 975 (1984); *Lombard* v. *United States,* 690 F.2d 215, 220-223 (D.C. Cir. 1982), cert. denied, 462 U.S. 1118 (1983); *Laswell* v. *Brown,* 683 F.2d 261, 265-267 (8th Cir. 1982), cert. denied, 459 U.S. 1210 (1983); *Henning* v. *United States,* 446 F.2d 774, 777-778 (3d Cir. 1971), cert. denied, 404 U.S. 1016 (1972).

Two courts of appeals have held that claims alleging post-discharge failures to warn about exposure to radiation encountered during military service were not barred by *Feres. Cole* v. *United States,* 755 F.2d 873, 876-880 (11th Cir. 1985); *Broudy* v. *United States,* 722 F.2d 566, 569-570 (9th Cir. 1983). In both of those cases, however, the complaints were ultimately dismissed after remand as barred by the discretionary function exception. *Broudy* v. *United States,* Civ. No. 79-2626 (C.D. Cal. Dec. 17, 1985); *Cole* v. *United States,* 635 F. Supp. 1185, 1190-1191 (N.D. Ala. 1986); see also *In re Consolidated United States Atmospheric Testing Litigation,* 616 F. Supp. 759, 771-777 (N.D. Cal. 1985), aff'd, 820 F.2d 982 (9th Cir. 1987).[3] Accordingly, there is no reason to consider whether claims

[3] The district court had concluded (603 F. Supp. at 244) that *Broudy* and *Cole* are distinguishable from this case for several reasons. "First, the servicemen in these cases were exposed to such

based on post-discharge failures to warn are barred by *Feres,* since such claims are barred in any event by the discretionary function exception.

Finally, there is no reason to review the court of appeals' holding that the claims brought by the wives and children of veterans are barred. Those claims, which petitioners acknowledge were framed "to take advantage and use every possible mechanism to plead around the 'incident to service' doctrine" (Pet. 5), are, as the district court concluded (603 F. Supp. at 246, 247), without any scientific basis. Furthermore, there is no conflict in the circuits; the other courts of appeals to consider the matter have held, like the court below, that such claims are barred by *Feres. Hinkie* v. *United States,* 715 F.2d 96, 98-99 (3d Cir. 1983), cert. denied, 465 U.S. 1023 (1984); *Gaspard* v. *United States,* 713 F.2d at 1101-1102; *Mondelli* v. *United States,* 711 F.2d 567, 568-570 (3d Cir. 1983), cert. denied, 465 U.S. 1021 (1984); *Lombard* v. *United States,* 690 F.2d at 223-226; *Scales* v. *United States,* 685 F.2d 970, 973-974 (5th Cir. 1982), cert. denied, 460 U.S. 1082 (1983); *Monaco* v. *United States,* 661 F.2d 129, 133-134 (9th Cir. 1981), cert. denied, 456 U.S. 989 (1982); cf. *West* v. *United States,* 729 F.2d 1120 (7th Cir. 1984), aff'd, 744 F.2d 1317 (1984) (dismissal of claims on behalf of children affirmed by an equally divided court), cert denied, 471 U.S. 1053 (1985). Accordingly, there is no basis for review of those claims.

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large doses of radiation as to approach the level of intentional experimentation * * *. Second, they involved exposure to radiation, a substance considered far more likely to cause adverse health effects than was Agent Orange. Finally, imposing on the Veterans' Administration a duty to warn of the uncertain consequences of Agent Orange exposure might well encounter another hurdle—the discretionary function exception * * *."

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

DONALD B. AYER
*Acting Solicitor General**

DECEMBER 1987

* The Solicitor General is disqualified in this case.

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